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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC., *Appellant*

vs.

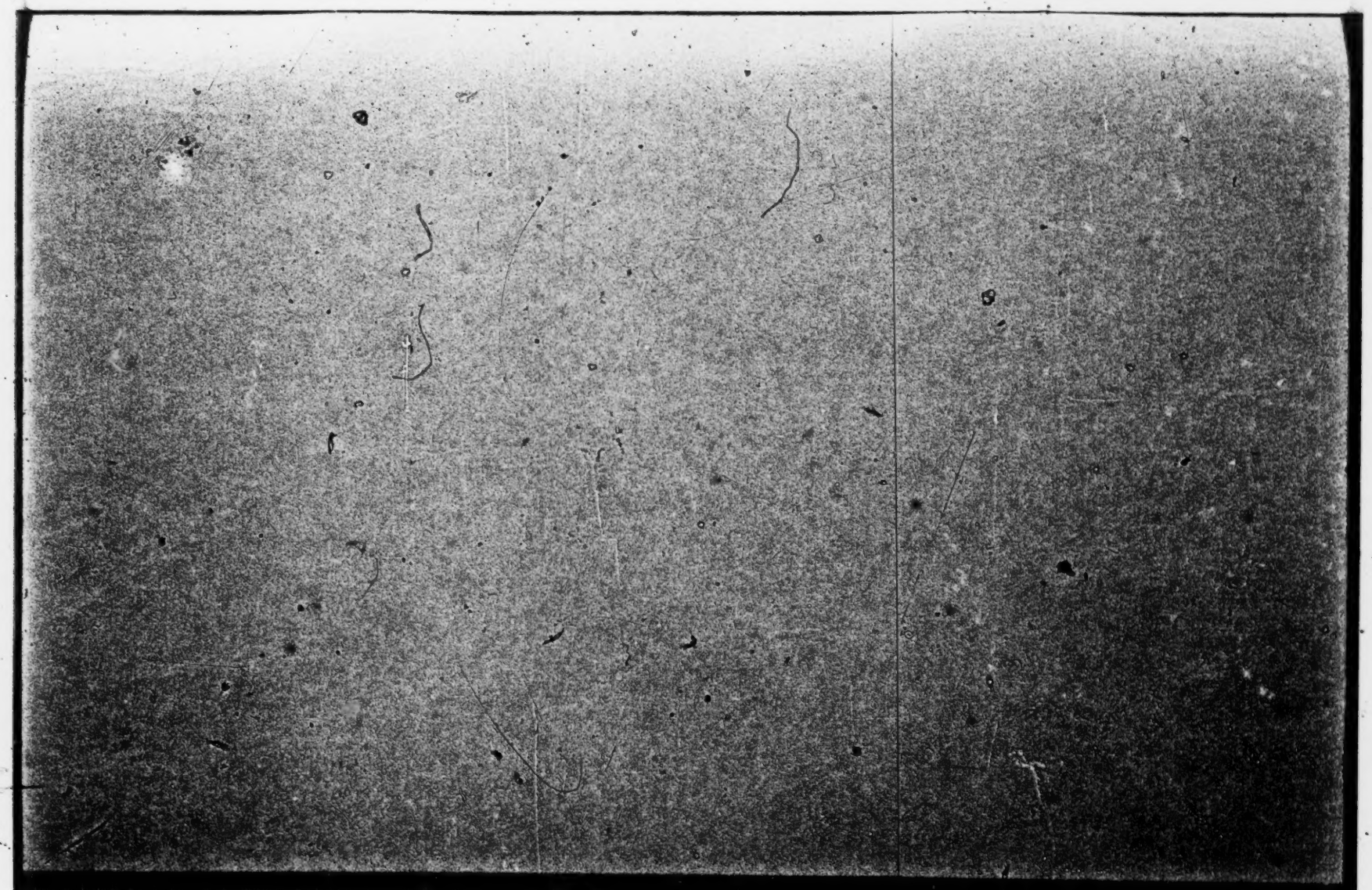
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPER-STATE LINES, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., CENTRAL FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., SAIA MOTOR FREIGHT LINES, INC., HERRIN TRANSPORTATION CO., and RYDER TRUCK LINES, INC., *Appellees*

On Appeal From The United States District Court For The Central District of California

Motion To Affirm

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT & STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014
LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT LINES, INC.
Post Office Box 3989
Dallas, Texas 75208
M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER AND BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102
Attorney for Appellee, Braswell Motor Freight Lines, Inc.

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070



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On Appeal From The United States District Court For The Central District of California

Motion To Affirm

Pursuant to Rule 16.1(c) of the Rules of this Court, intervening defendant, Braswell Motor Freight Lines, Inc., appellee herein, hereafter called appellee or Braswell, moves to affirm the judgment of the United States District Court, Central District of California[1], a statutory court of three Judges[2], affirming the deci-

[1]Not yet reported but copy attached to Appellant's Jurisdictional Statement as Appendix A. Copy of said Court's order denying appellant's motion to amend findings and make new findings is attached to appellant's Jurisdictional Statement as Appendix B.

[2]An action under 28 U.S.C. 1336, 1398, 2284, 2321-2325.

sion of the Interstate Commerce Commission[3], and as grounds for such motion says:

THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment (see appellant's Appendices A and B) of a statutory court of three judges affirming the report and order of the Interstate Commerce Commission (see appellant's Appendix C — 104 M.C.C. 297).

Appellant had been accorded a full, complete and fair hearing before the Commission extending over many weeks, hearing more than 150 witnesses, receiving 229 exhibits, and compiling a record of more than 4,000 pages of transcript. At every step of the way all parties filed briefs with argument, and petitions for reconsideration with briefs and argument, until exhaustion of all administrative remedies.

The statement of the case by the Court below is complete and comprehensive as follows:

"Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation. These two companies ceased operations in 1964

[3]Reported at 104 M.C.C. 297.

due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

"The statutes involved are §§5(2) (a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U.S.C. §§5(2)(a)(i), 5(2)(b), 307 310a(b)].

"Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

"Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

"Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

"Section 210a(b) provides for the issuance of temporary authority for one motor carrier to operate or lease the rights of another carrier.

"In its §5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under §207 for an extension of the rights it sought to acquire.

"By its §5 purchase application, Strickland[4] sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east and northern service territory, on the one hand, and, on the other, New Orleans — from Texarkana, Texas, through Shreveport, Louisiana. Also, in a §207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

"Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

"Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland,

[4]Consolidated Copperstate Lines' appeal to this Court is pending under this Court's Docket No. 1128. They are companion cases decided by the Commission in one report and order and determined by the District Court, Central District of California (a statutory court) in one decision.

as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

"Before the Commission's orders became effective, this action was filed. A temporary injunction and interlocutory judgment have stayed the effective date of the Commission's orders."

AUTHORITIES AND ARGUMENTS

Appellant sets out three questions (J.S. p. 5) which it says are so substantial as to require consideration by this Court. To the contrary, such questions have been determined, with finality, many times.

Obviously each of the three issues (questions) tendered by appellant are mere issues of fact.

Appellant is merely fretting about the fact determinations as made by the Commission and its conclusions as drawn therefrom.

But determination of the facts and the conclusions to be drawn therefrom are conclusive if the Commission has made adequate findings which are supported by substantial evidence — a rule too well known to require authority. Stated slightly differently, if a Commission order has a reasonable basis and is supported by substantial evidence, the courts must not interfere with it.

McLean Trucking Co. vs. United States, 321 U.S. 67, 87, is quite appropo here where it is said:

> "Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation but in its coordination of all other forms.' 79 Cong. Rec. 12,207. 'The wisdom and experience of the Commission,' not the courts, must determine," etc. p. 87 . . . "If Commission

did not exceed the statutory limits within which Congress confined its discretion and its findings are supported by evidence, it is not our function to upset its order." (at p. 88).

However, all this Court need do to convince itself that nothing is involved here except a dispute as to facts is to scan appellant's petition for reconsideration as filed with the Interstate Commerce Commission (in the ICC record, now before this Court), or the motion of appellant filed in the District Court "*to amend findings and make new findings.*" Filed on or about December 10, 1968, served on all parties on December 10, 1968. Appellant argues facts, facts.

But the Commission, not the courts, is the arbiter of the evidence, and where, as here, the findings of fact and conclusions of law are predicated on the prescribed criteria, adhered to in the Commission's decision, then this Court does not interfere with the Commission's exercise of its discretion. *U.S. vs. Pierce Auto Freight Lines*, 327 U.S. 515; *Interstate Commerce Commission vs. Union Pacific R. Co.*, 222 U.S. 541; *Rochester Telephone Co. vs. U.S.*, 307 U.S. 125; *Mississippi Valley Barge Line Co. vs. United States*, 292 U.S. 282.

Since here the Commission directly found a Section 5(4) violation, as well as violations of its rules, Section 307.5(c), and previous violations found in *Gordon-Strickland* complaint cases, see second paragraph Commission decision, p. 317, we should note that in *Rochester Telephone*, supra, this Court said that "This is an issue of fact to be determined by the special cir-

cumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand."

Appellant's question number 3 takes a little additional quirk. It asserts that appellant has "been deprived of essential procedural rights when the Commission rested its decision on factors not raised by the parties or previously considered in the proceeding and then denied Strickland any opportunity to respond to the new issues injected into the proceeding by the Commission's Report." (J.S. p. 3).

These are shockingly untrue assertions. It raises no question of procedural due process.

Violations of the statute and of the Commission's lawfully established rules and regulations go directly to the question of an applicant's fitness.

Section 307, 49 U.S.C. 307, provides that:

> "Subject to section 310 of this title, a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is *fit*." etc.

The Commission in its decision in this case said: "*The question of fitness is always before us* in section 5 proceedings." 304 M.C.C. at p. 315. Emphasis supplied.

Appellant Strickland Transportation Co., Inc., and its attorneys were charged with notice of the law and of Commission rules and regulations. They knew or should have known that fitness is always an issue; that they had the burden to prove fitness.

Equally astonishing is the last phrase of question number 3 that the Commission "then denied Strickland any opportunity to respond to the *new* issue injected into the proceedings by the Commission's Report." What new issue? There was no new issue. If we can understand the so-called "Question," the so-called "new issue" is as old as the Motor Carrier Act, Interstate Commerce Act, Part II, itself.

But appellant says in its argument (J.S. at p. 21) that: But without warning and without affording Strickland any opportunity to respond to the *new* legal issues or to clarify the factual matters which the Commission *suddenly and unexpectedly* had decreed to be relevant . . ." etc. (This is an amazing statement).

As a matter of fact, there was the statute referred to above. *49 U.S.C. 307.* And as a matter of fact (if we can understand question 3 at all), protestants, intervening defendants here, raised the so-called *new issue* from the beginning.

All intervening defendants (protestants) filed a joint brief with the Examiner, served on *all parties* on November 9, 1965 (see ICC record), in which protestants (appellees here) set forth the proposition that:

> "Independent of other considerations, unlawful operations by vendors and vendees require denial of each application." See said brief, Table of Contents, p. VI.

This proposition was pursued beginning at page 28

of said brief and continuing through page 39. This discussion is carefully and liberally annotated to the ICC record. See pp. 28-36. Succeeding pages through 39 cite authorities, including *ABC Freight Forwarding Corp. vs. United States*, 125 Fed.Supp. 926, 929, affirmed 348 U.S. 967.

> "The Commission is better equipped than a court to reach a determination on the issues which have been entrusted to it. The Commission is charged with the determination as to whether granting the application would be consistent with the 'national transportation policy'. Part of that policy is 'to provide for fair and impartial regulation of all modes of transportation'. *It may well be that it would not be consistent with this policy to reward an applicant who has flouted the regulatory authority by extending its activities, illegally and through subterfuge, into an area for which no authority had yet been obtained.*" (Emphasis supplied)

Nothing was without "warning," or "opportunity to respond." The Commission did nothing "suddenly and unexpectedly." Appellant here did defend and appellees here did pursue the point on through appellant's "Petition for Reconsideration and Oral Argument and to Reopen to Receive Tendered Evidence." See said Petition in ICC record, dated at Oklahoma City, September 22, 1967.

No evidence was "tendered," however, at least in the commonly accepted meaning of the term. There was no prayer. Said Petition simply concluded with the following:

> "Wherefore, it is submitted that the Commission should reconsider its July 31, 1967, order and after such reconsideration make and issue its order adopting the recommendations of the Hearing Examiner." at p. 39.

But the Commission is the final determining authority.

Appellant Strickland's complaint in this case as filed in the court below, raises no such question as is now contained in question number 3 of its jurisdictional statement.

The decision of the District Court, Central District of California, must be affirmed.

As said in *Jacob Siegel vs. Federal Trade Commission*, 327 U.S. 608, 611-612:

> "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy."

There is no substantial question of law here presented requiring this Court's attention. In summation, we quote from *Virginian R. Co. vs. United States*, 272 U.S. 658, 71 Ld.Ed. 463, 469:

> "The argument urged in this connection is appropriate for consideration by the Commission, and has presumably been duly considered by it.

> The fact that it has not proved persuasive affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal."

The decision of the court below should be affirmed, and this appellee so prays.

Respectfully submitted,

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT
& STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014

LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT
LINES, INC.
Post Office Box 3989
Dallas, Texas 75208

T. S. Christopher

M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER AND BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102

Attorney for Appellee,
Braswell Motor Freight Lines, Inc.

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CENTRAL FREIGHT LINES, INC.,
RED BALL MOTOR FREIGHT, INC.,
SAIA MOTOR FREIGHT LINES, INC.,
HERRIN TRANSPORTATION CO., and
RYDER TRUCK LINES, INC.,
Appellees.

CERTIFICATE OF SERVICE

I, T. S. Christopher, attorney for Appellee, Braswell Motor Freight Lines, Inc., and a member of the Bar of this Court, do hereby certify that I have this day served the "Motion to Affirm" of Braswell Motor Freight Lines, Inc., upon the parties to this action by

mailing copies thereof to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

as service upon the Appellee, United States of America; to

Robert E. Ginnane, Esquire
Nahum Litt, Esquire
Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

as service upon Appellee, Interstate Commerce Commission; to

Arnold Burke, Esquire
Axelrod, Goodman and Steiner
39 South LaSalle Street
Chicago, Illinois 60603

and to

Joseph D. Mullender, Jr., Esquire
Ball, Hunt, Hart and Brown
120 Linden Avenue
Long Beach, California 90802

as service upon Appellee, Consolidated Copperstate Lines; to

Reagan Sayers, Esquire
Clayte Binion, Esquire
Rawlings, Sayers & Scurlock
Century Life Bldg.
Post Office Box 17007
Fort Worth, Texas 76102

as service upon Appellee, Ryder Truck Lines, Inc., to

Phineas Stevens, Esquire
Suite 700—Petroleum Bldg.
Post Office Box 1250
Jackson, Mississippi 39205

and to

Robert E. Joyner, Esquire
2111 Sterick Building
Memphis, Tennessee 38103

as service upon Appellees Arkansas-Best Freight System, Inc., and Gordons Transports, Inc.; to

Mert Starnes, Esquire
James, Robinson, Felts & Starnes
The 904 Lavaca Building
Austin, Texas 78701

as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc. and Saia Motor Freight Lines, Inc.; to

Leroy Hallman, Esquire
William E. Livingstone, III, Esquire
Phinney, Hallman, Pulley & Livingstone
4555 First National Bank Building
Dallas, Texas 75202

as service upon Appellee, Herrin Transportation Company; to

W. D. Beatenbough, Esquire
Vice President-Traffic
Ryder Truck Lines, Inc.
Post Office Box 2408
Jacksonville, Florida 32203

to

Charles L. Ford, Esquire
Texas Railroad Association
Post Office Box 1767
Austin, Texas 78767

to

Rollo E. Kidwell, Esquire
Post Office Box 10125
Dallas, Texas 75207

to

Charles D. Mathews, Esquire
Post Office Box 47407
Dallas, Texas 75247

to

Hugh T. Matthews, Esquire
Brooks, Montgomery & Matthews
630 Fidelity Union Tower
1507 Pacific Street
Dallas, Texas 75201

to

Franklin H. Wilson, Esquire
McCutchen, Black, Verleger & Shea
615 South Flower Street
Los Angeles, California 90017

and to

Theodore W. Russell, Esquire
Robert Y. Schureman, Esquire
1545 Wilshire Boulevard
Los Angeles, California 90017

as additional service upon various of the aforesaid Appellees; to

Dennis G. Lyons, Esquire
1229 Nineteenth Street, N. W.
Washington, D. C. 20036

to

W. T. Brunson, Esquire
419 Northwest Sixth Street
Oklahoma City, Oklahoma 73102

to

Joe A. Keith, Esquire
301 M. & P. Bank Building
Sherman, Texas 75090

as service upon Appellant, Strickland Transportation Company, Inc.; and I do further certify that such mailing was made, postage prepaid, this 28th day of March, 1969.

T. S. Christopher

T. S. CHRISTOPHER
2412 Continental Life Bldg.
Fort Worth, Texas 76102
Attorney for Appellee,
BRASWELL MOTOR FREIGHT LINES, INC.